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No. 06-43

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STONERIDGE INVESTMENT PARTNERS, LLC,

Petitioner,

v.

SCIENTIFIC-ATLANTA, INC. and MOTOROLA, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This supplemental brief is submitted to call attention to a decision handed down by the Ninth Circuit Court of Appeals on June 30, 2006, in *Simpson v. AOL Time Warner Inc.*, No. 04-55665, __ F.3d __, 2006 U.S. App. LEXIS 16556, 2006 WL 1791042 (9th Cir. June 30, 2006) ("*AOL Time Warner*"), which is in direct conflict with the decision of the Eighth Circuit Court of Appeals in the instant case. (*AOL Time Warner* was docketed after submission to printing of petition.)

In the *Stoneridge* case the Eighth Circuit "conclude[d] that *Central Bank* and the earlier cases on which it relied stand for three governing principles: . . . (2) A device or contrivance is not 'deceptive,' within the meaning of § 10(b), absent some misstatement or a failure to disclose by one who has a duty to disclose." 443 F.3d 989, 992.

In *AOL Time Warner*, the court rejected the contention that to "impose liability for conduct other than the making of a material misstatement or omission . . . would conflict with *Central Bank*." 2006 U.S. App. LEXIS 16556, at *24, 2006 WL 791042, at *8. The court stated "We see no justification to limit liability under § 10(b) to only those who draft or edit the statements released to the public. To the contrary, § 10(b) prohibits any person or entity from using or employing any deceptive device, directly or indirectly, in connection with the purchase and sale of securities." *Id.* (citations omitted).

In distinguishing between primary violators of § 10(b) and those who merely aid and abet a violation the court in *AOL Time Warner* held that to be liable as a primary violator for participation in a scheme to defraud the defendant's own conduct contributing to the overall scheme must have had a

deceptive purpose and effect. The court agreed with the position of the SEC in its *amicus* brief that such a conduct constitutes a deceptive act under § 10(b). Merely assisting another's conduct, however, but failing to perform an action that created a false appearance as part of the scheme would not be sufficient.

> The focus of the inquiry on the deceptive nature of the defendant's own conduct ensures that only primary violators (that is, only those defendants who use or employ a manipulative or deceptive device) are held liable under the Act.

2006 U.S. App. LEXIS 16556, at *25, 2006 WL 1791042, at *8.

The conduct of Respondents in *Stoneridge* clearly would satisfy the test established by the Ninth Circuit. As discussed in the Petition, Respondents themselves engaged in conduct which had "a deceptive purpose and effect." Each Respondent engaged in the backdating of the advertising contract with Charter which had the deceptive purpose and effect of severing what was actually an integral relationship between those contracts and the monies that Charter was funneling to Respondents to pay for the advertising. Moreover, Respondent Motorola agreed to camouflage $10,800,000, which it received from Charter as "liquidated damages" and with which it then purchased advertising from Charter that it did not need. Similarly, Respondent Scientific-Atlanta falsely claimed that it was increasing the prices of set top boxes to be paid by Charter to conceal the true nature of $6.73 million, which it received from Charter and which it returned to Charter by purchasing advertising.

The determination of what constitutes a primary violation of § 10(b) is far too important an issue to be governed by the fortuity of the forum in which a case is being litigated. This Court should bring certainty where there is currently clear cut disagreement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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